CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 138.

FRED C. RECTOR, TRUSTEE OF REINHARD & COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMERCIAL NATIONAL BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED DECEMBER 12, 1904.

(19,562.)

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1-4 Supreme Court of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Duly Organized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error. } No. 8161.

Error to Circuit Court of Franklin County, Ohio.

Record.

Pugh & Pugh, Thomas E. Steele, attorneys for plaintiff in error.
F. F. D. Albery, attorney for the defendant in error, The Commercial National Bank.

Filed Nov. 19, 1902, in supreme court of Ohio.

L. E. EMERSON, Clerk.

5 In the Supreme Court of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Duly Organized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error. } No. 8161.

(No. 8161.)

Petition in Error.

(Filed November 1, 1902.)

Fred C. Rector, trustee in bankruptcy of Reinhard & Company, plaintiff in error, complains of the defendant in error, The Commercial National Bank, and says it is a corporation duly organized, incorporated and existing under the national banking laws of the
6 United States, and that by the consideration of the circuit court of Franklin county, at the September, 1902, term thereof, in a certain case then and there pending, wherein this plaintiff in error was plaintiff in error and the defendant in error was defendant in error, the said defendant in error recovered a judgment against the said plaintiff in error as of record is manifest; a tran-

script of the docket and journal entries thereof is filed herewith together with a transcript of the docket and journal entries of the court of common pleas of Franklin county, with all and singular the original papers and proceedings in said case, including the bill of exceptions.

There is error in said record, proceedings and judgment of said circuit court in this, to wit:

1. The said circuit court erred in affirming the judgment of the court of common pleas.

2. The said circuit court erred in not reversing the judgment of the court of common pleas.

3. The said circuit court erred in not rendering the judgment the lower court ought to have rendered, to wit, in favor of plaintiff in error, upon the pleadings and agreed statement of facts.

4. Said judgment of the circuit court is contrary to law.

5. Other errors apparent upon the face of the record, which were and are prejudicial to this plaintiff in error.

This plaintiff in error therefore prays that said judgment may be reversed and that he may be restored to all things he has
7 lost thereby and for all other proper relief.

PUGH & PUGH,
THOMAS E. STEELE,
Attorneys for Plaintiff in Error.

Waiver.

The defendant in error, by its attorney undersigned, hereby waives the issuing of summons and service of process and enters its appearance herein.

F. F. D. ALBERY,
Attorney for Defendant in Error,
The Commercial National Bank.

8 . In the Circuit Court of Franklin County, Ohio.

FRED C. RECTOR, as Trustee of Reinhard & Co., Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation, Defendant in Error. } (No. 1903.)

Transcript of Docket and Journal Entries.

1902, April 29.—Petition in error filed; precipe filed; summons in error issued to sheriff of Franklin county, Ohio; return September 29, 1902.

1902, April 29.—Transcript docket and journal entries filed.

1902, April 29.—Six original papers filed.

1902, April 29.—Bill of exceptions filed.

1902, October 30.—Judgment affirmed; plaintiff in error to pay costs as per entry; exceptions. 6-302.

September Term, October 30, 1902.

The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said Fred C. Rector, trustee of Reinhard & Co., plaintiff in error herein, together with the original papers and pleadings and a duly
9 certified transcript of the orders and judgment of the court of common pleas of Franklin county, Ohio, filed therewith in the said proceeding, wherein Fred C. Rector, trustee, etc., was plaintiff and said The Commercial National Bank was defendant, mentioned and referred to in said petition in error, and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of said court of common pleas.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said court of common pleas, in said action in favor of the said defendant in error, and against the said plaintiff in error, be and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, and in default thereof that execution issue therefor.

Ordered that a special mandate be sent to the court of common pleas of Franklin county, to carry this judgment into execution.

To each and all of the foregoing rulings, orders, and judgments and especially to the judgment of the court affirming the judgment of the court of common pleas, the plaintiff in error in open court then and there excepted and still excepts.

(Certificate attached.)

10 Petition in Error.

(Filed April 29, 1902.)

Now comes Fred C. Rector, trustee of Reinhard & Co., plaintiff in error herein, and respectfully shows and represents to the court, that, by the consideration of the common pleas court of Franklin county, Ohio, at the January, 1902, term thereof, in a certain case then and there pending, wherein Fred C. Rector, as trustee of Reinhard & Company, was plaintiff, and The Commercial National Bank, a corporation duly organized, existing and incorporated under and by virtue of the national banking laws of the United States, defendant in error herein, was defendant, the said defendant in error recovered a judgment againt the said plaintiff in error, as of record is manifest; a transcript of the docket and journal entries in said case are filed herewith, together with all and singular the original papers, including the bill of exceptions.

There is error in said judgment, record and proceedings of the common pleas court of Franklin county, Ohio, in these respects, to wit:

1. Said common pleas court erred in overruling plaintiff's motion for a new trial.

4. Said court of common pleas erred in rendering judgment in favor of the defendant in error and against the plaintiff in error.

3. Said judgment of the court of common pleas is contrary to law.

4. Said court of common pleas erred in rendering judg-
11 ment for the defendant in error and against the plaintiff in error when upon the agreed statement of facts, plaintiff in error was entitled to recover judgment against the defendant in error, as prayed for in the petition.

5. Other errors of record manifest, which were and are prejudicial to this plaintiff in error.

Wherefore plaintiff in error prays that the said judgment of the court of common pleas may be reversed and that this court may proceed to render the judgment that the lower court ought to have rendered in favor of this plaintiff in error.

PUGH & PUGH AND
T. E. STEELE,
Attorneys for Plaintiff in Error.

Precipe.

Clerk:

Issue summons in error for the defendant in error, returnable according to law.

PUGH & PUGH,
THOMAS E. STEELE,
Attorneys for Plaintiff in Error.

Summons in Error.

THE STATE OF OHIO:

Circuit Court of Franklin County.

FRED C. RECTOR, as Trustee of Reinhard Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, Defendant in Error.

To the sheriff of Franklin county:

You are hereby commanded to notify The Commercial National Bank, defendant in error, that Fred C. Rector, as trustee of
12 Reinhard Company, plaintiff in error, has filed a petition in the office of the clerk of the circuit court of the State of Ohio,

within and for said county, asking the reversal of a judgment which said defendant in error obtained against said plaintiff in error, at the April term, A. D. 1902, in the court of common pleas of said county.

You will make due return of this summons on or before the twenty-ninth of September, 1902, the first day of the next term of said circuit court.

Witness my signature and the seal of said circuit court at Columbus, in said county, this twenty-ninth day of April, A. D. 1902.

[SEAL.] JOHN W. McCAFFERTY, Clerk,
By CHARLES MORTIMER,
Deputy Clerk.

Sheriff's Return.

Received this writ April 29, A. D. 1902, at 9 o'clock, a. m., and pursuant to its command, on May 6, 1902, I served the within named defendant, The Commercial National Bank, by personally handing a true and duly certified copy of this writ with all the indorsements thereon to W. F. Huffman, cashier of said The Commercial National Bank; the president, vice president, secretary, treasurer, not found within my bailiwick. Sheriff's fees, $1.50.

CHARLES A. PEARCE, Sheriff,
By E. E. BASTIAN, Deputy.

13 In the Court of Common Pleas, Franklin County, Ohio.

FRED C. RECTOR, as Trustee of Reinhard & Company, Plaintiff,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Duly Organized, Existing, and Incorporated under and by Virtue of the National Banking Laws of the United States, Defendant. (No. 42209.)

Transcript of Docket and Journal Entries.

1900, December 1.—Petition, affidavit and precipe filed; summons issued to sheriff of Franklin county, Ohio. Return December 10. Answer December 29, 1900.
1900, December 15.—Notice for trial filed by plaintiff.
1900, December 26.—Notice for trial filed by plaintiff.
1900, December 27.—Notice for trial filed by plaintiff.
1900, December 29.—Answer filed.
1901, November 21.—Notice for trial filed by plaintiff.
1901, November 27.—Notice for trial filed by defendant.
1901, November 28.—Notice for trial filed by defendant.
1901, August 14.—Notice for trial filed by plaintiff.

1901, August 26.—Notice for trial filed by plaintiff.
14 1901, August 29.—Notice for trial filed by defendant.
1901, December 21.—Notice for trial filed by plaintiff.
1901, December 21.—Notice for trial filed by plaintiff.
1901, December 27.—Notice for trial filed by defendant.
1902, April 4.—Notice for trial filed by defendant.
1902, April 4.—Motion for new trial filed.
1902, April 5.—Plaintiff's motion for new trial overruled; judgment for defendant as per entry; exceptions. 125–487.
1902, April 25.—Bill of exceptions filed.
1902, April 25.—Bill of exceptions allowed and signed, made part of record; but not spread upon journal. 126–342.

APRIL 5, 1902.

FRED C. RECTOR, as Trustee, etc., Plaintiff,
vs.
THE COMMERCIAL NATIONAL BANK, Defendant. } No. 42280.

This cause coming on for hearing upon the petition, the answer of the defendant, and the agreed statement of facts was submitted to the court without the intervention of a jury; on consideration whereof the court find that the plaintiff has no cause of action as claimed in his petition, that the statements made by the defendant in its answer are true and that it is not indebted to the plaintiff as alleged.

It is therefore considered by the court that this action be dismissed at the costs of the plaintiff, to all of which finding and judgment the plaintiff at the time excepted, and thereupon the plaintiff filed his motion for a new trial herein, which motion is overruled, to which judgment of the court overruling said motion the plaintiff
15 also excepts. And upon motion of the plaintiff leave is given to prepare and file a bill of exceptions herein within the time prescribed by law.

APRIL 25, 1902.

This day came the plaintiff and presented to the court his certain bill of exceptions and prayed the same to be allowed, signed and made a part of the record in this case.

And it appearing to the court that said bill of exceptions had been presented to counsel for the defendant and to the trial judge within the respective times prescribed by law, and that the same is in all respects a true bill; it is therefore, this day considered that said bill of exceptions be and it is hereby allowed and signed and made part of the record in this case, but not to be spread at large upon the journal of the court, according to the statute in such cases made and provided.

Bill of exceptions filed.

(Certificate attached.)

Petition.

(Filed December 1, 1900.)

The plaintiff respectfully represents and avers that on the thirteenth day of September, A. D. 1900, he was duly appointed trustee of Reinhard & Company, bankrupts, and he thereupon accepted such trust and duly qualified, and ever since has been the duly appointed, legally qualified and acting trustee in bankruptcy of said Reinhard & Company.

He further represents that prior to that time, to wit, on August 10, A. D. 1900, in a proceeding then and there pending for that
16 purpose in the district court of the United States for the southern district of Ohio, eastern division, the said Reinhard & Company were adjudged bankrupt, and said petition for such adjudication was duly filed in said court on April 11, 1900.

The Commercial national bank is and was, at all the times hereafter referred to, a corporation duly organized, existing and incorporated under and by virtue of the national banking laws of the United States, and is, and was at all the times mentioned carrying on the banking business, pursuant to law, in the city of Columbus, Ohio.

Plaintiff avers and represents to the court that on April 10, A. D. 1900, the said Reinhard & Company, a partnership consisting of John G. Reinhard and Henry A. Reinhard, through the deeds of its individual members, committed an act of bankruptcy, to wit, made a general assignment for the benefit of its creditors.

This plaintiff further avers that on said April 10, A. D. 1900, the said Reinhard & Company assigned and transferred to the Commercial national bank, and the said Commercial national bank received of the moneys belonging to said Reinhard & Company, $970.45.

Plaintiff says that said payment to the Commercial national bank was made for the purpose of giving an unlawful and fraudulent preference to the said the Commercial national bank, and was by it for such purpose so received, and said transfer was made to defraud the creditors of said Reinhard & Company.

Wherefore this plaintiff, Fred C. Rector, as trustee in bankruptcy for Reinhard & Company, prays judgment against the Com-
17 mercial National Bank, for $970.45, with interest from April 10, A. D. 1900, and for his costs herein expended.

PUGH & PUGH,
T. E. STEELE,
Attorneys for Plaintiff.

(Duly verified.)

Precipe.

To the clerk:

Issue summons to the sheriff of Franklin county, Ohio, for the defendant, The Commercial National Bank; endorse action for money only; amount claimed, $970.45, with interest from April 10, A. D. 1900, returnable according to law.

PUGH & PUGH,
T. E. STEELE,
Attorneys for Plaintiff.

Summons.

THE STATE OF OHIO, } ss:
Franklin County, }

To the sheriff of said county, Greeting:

You are commanded to notify the Commercial National Bank that it has been sued by Fred C. Rector, as trustee of Reinhard & Company, in the court of common pleas of Franklin county, and that unless it answer by the twenty-ninth day of December, in the year of our Lord one thousand nine hundred, the petition of said plaintiff against it, filed in the clerk's office of said county, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons, on the tenth
18 day of December in the year of our Lord one thousand nine hundred.

Witness my hand and seal of said court, this first day of December, in the year of our Lord one thousand nine hundred.

[SEAL.] JOHN W. McCAFFERTY,
Clerk Court Common Pleas, Franklin County,
By CHAS. C. SWISHER, Deputy.

Sheriff's Return.

Received this writ December 1 in the year of our Lord one thousand nine hundred, at 4 o'clock, p. m., and pursuant to its command, on December 3 in the year of our Lord one thousand nine hundred, I served the within named defendant, The Commercial National Bank, by personally handing a true and duly certified copy of this writ with all the indorsements thereon, to Wm. T. Cope, president of said The Commercial National Bank. Sheriff's fees, $1.25.

CHAS. A. PEARCE, Sheriff,
By ED. BASTIAN, Deputy.

Answer.

(Filed December 29, 1900.)

Now comes the defendant and for answer to the petition of the plaintiff, says: It admits all of the averments of the plaintiff's petition except the following which it denies:

That on the tenth day of April, 1900, the said Reinhard & Company assigned and transferred to the Commercial national
19 bank and the said Commercial national bank received of the moneys belonging to said Reinhard & Company $900, and that said payment to the Commercial national bank was made for the purpose of giving an unlawful and fraudulent preference to the said the Commercial national bank, and was by it for such purpose so received and that said transfer was made to defraud the creditors of said Reinhard & Co.

This defendant further denies that there is anything due from it to the said Reinhard & Co., or to the said Fred C. Rector as such trustee and denies that it has in its possession any money or property of any description belonging to the estate of the said bankrupts.

Wherefore this defendant prays to be dismissed from this action and to recover its costs herein.

F. F. D. ALBERY,
Attorney for the Commercial National Bank.

(Duly verified.)

Motion for New Trial.

(Filed April 4, 1902.)

Now comes plaintiff and moves the court to set aside the said finding and judgment entered in this cause and for new trial for the following reasons, to wit:

1. That the said finding and judgment are contrary to, and against the weight of the evidence.
2. Said judgment is not sustained by the law, and is contrary to the law.
3. Judgment should have been rendered for the plaintiff instead of for the defendant.
4. For other errors apparent upon the face of the record.

T. E. STEELE,
PUGH & PUGH,
Attorneys for Plaintiff.

20 Bill of Exceptions.

(Filed April 25, 1902.)

Be it remembered that on the — day of April, A. D. 1902, at the January, 1902, term of the court of common pleas of Franklin county, Ohio, upon the trial therein of the above entitled case, before Honorable D. C. Badger, judge, (a trial by jury being waived by both parties), there was offered and read in evidence an agreed statement of facts, clothed in the words and figures following, to wit:

For the purpose of saving time and expense and facilitating the disposition of this case, it is now agreed between the plaintiff and the defendant that this case shall be submitted to the court upon the pleadings herein filed, and the following:

Agreed Statement of Facts.

For ten years or more prior to April 10, 1900, Reinhard & Company kept an open account with the Commercial national bank, depositing their outside items on places where they had no correspondent, for the purpose of saving themselves the exchange or collection charges on some of these items. The balance with the Commercial national bank on the morning of April 10, 1900, was ten hundred and sixty-seven and 76-100 dollars ($1067.76). On that morning John G. Reinhard came to the Commercial national bank with Reinhard & Company's draft on New York for two thou-

21 sand ($2000.00) dollars, for which the Commercial national bank gave him the currency. This money was used by Reinhard & Company to pay checks drawn on them, and was paid out over their counter on April 10 to their customers.

At 12:15 o'clock, p. m., on said day, Reinhard & Company, a partnership, composed of John G. Reinhard and Henry A. Reinhard, said partnership and each of said partners being then insolvent, filed a deed of assignment in the probate court of Franklin county, Ohio, and at about the same hour and afternoon of said day, their banking house was closed, at the same time each of said partners filed deeds of assignment.

The following day a petition was filed in the district court of the United States, for the southern district of Ohio, by certain creditors, alleging that said assignment was an act of bankruptcy; and thereafter such proceedings were had that said Reinhard & Company were on Angust 11, 1900, adjudged bankrupt, and the plaintiff became their trustee, pending which election of trustee, one Walter Zinn was appointed and acted as receiver of Reinhard & Company, but the fact of such insolvency and the making of said assignment were not known to said the Commercial national bank except by hearsay until after said amount of two thousand ($2000.00) dollars was charged back on the account of Reinhard & Company, and until

after it had received the check of the manager of the clearing house for said sum of nine hundred and seventy and 45-100 ($970.45) dollars.

22 During said day of April 10, 1900, the Commercial national bank learned by street rumor that Reinhard & Company's draft on New York would probably not be paid, and it charged the same back on the account of Reinhard & Company, which overdrew their account nine hundred and thirty-two and 24-100 ($932.24) dollars.

On the tenth day of April, 1900, Reinhard & Company sent their representative to the clearing house as usual at 12:30 p. m. They received checks from the clearing house as usual which their representative took back to their bank, and the checks which they brought to the clearing house were cleared on the respective banks as usual in all cases. Then about one o'clock, p. m., after the manager of the clearing house had made his adjustment of balances for the day and had made out the checks to pay for the same, Reinhard's representative brought back the checks which the different banks of the clearing house had cleared on them that day.

The manager took these checks back to the different banks that had cleared them and deducted the amounts of their clearings that day. This left a balance of $— due to Reinhard & Company from the clearing house for that day. Out of this balance he gave a check for $— to the City Deposit bank, and for the balance of $970.45 he gave a check to the Commercial national bank.

When Mr. Field, the manager of the clearing house, went to the Commercial national bank to return the checks which they had cleared on Reinhard & Company that day he informed Mr. Hoffman, the cashier, that that bank had suspended, and that he had a

23 balance on hand due Reinhard & Company of $--, $— of which he was going to pay to the City Deposit bank, leaving a balance of $970.45 due the said Reinhard & Company, which he did not know what to do with. Mr. Hoffman informed him that he had advanced Reinhard & Company $2000.00 on that morning and suggested that he pay the balance to him. He agreed to this and gave him the check as suggested. Said amount was credited by the Commercial national bank to Reinhard & Company, leaving a balance, as shown by the books of the Commercial national bank, due from said bank to Reinhard & Company of thirty-eight and 21-100 ($38.21) dollars, which amount was paid over to Walter Zinn, as receiver of Reinhard & Company, upon his check as such receiver drawn on the Commercial national bank on the sixteenth day of May, 1900.

FRED C. RECTOR,
By T. E. STEELE AND
PUGH & PUGH,
His Attorneys.

THE COMMERCIAL NATIONAL BANK,
By F. F. D. ALBERY, For Defendant.

And this was all the evidence offered by either party upon the trial of said case.

And thereupon after hearing the arguments of counsel the court rendered its judgment in favor of the defendant, as of record is manifest, and the plaintiff within three days filed his written motion for a new trial upon the grounds set forth therein, but the court overruled the same and entered judgment as aforesaid, to each and all of said rulings above recited the plaintiff by his counsel in
24 open court excepted and still excepts and here presents his certain bill of exceptions and prays the court to allow and sign the same, which is accordingly done at Columbus, Ohio, this twenty-fifth day of April, A. D. 1902.

D. C. BADGER,
Judge of the Court of Common Pleas of Franklin County, Ohio.

1902, April 25.—Received this bill. No objection to signing same.

F. F. D. ALBERY,
For Defendant.

25 In the Supreme Court of Ohio, January Term, A. D. 1904.

THE STATE OF OHIO, City of Columbus, } ss:

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held, among other things, is the following, to-wit:

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error, *vs.* THE COMMERCIAL NATIONAL BANK, a Corporation Duly Organized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error.	No. 8161. Error to the Circuit Court of Franklin County.

Nov. 1, 1902. Petition in error and waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers and bill of exceptions filed.
" 12, " Papers taken by F. B. Toothaker.
" 19, " " returned by F. B. Toothaker.
" " " Printed record filed. 11/20/02, Proof of service filed.

Jan'y 23, 1903. Plaintiff's printed brief filed. 1/26/03, Proof of service filed.
May 25, " Defendant's printed brief and proof of service filed.
July 6, " Plaintiff's printed reply brief filed. 7/13/03, Proof of service filed.
Sept. 10, " Printer's receipted bill ($12.00) filed.
Nov. 24, 1903. Judgment affirmed,—Journal entry:

This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby affirmed; and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered, that a special mandate be sent the court of common pleas of Franklin county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the circuit court of Franklin county, "for entry."

Journal No. 19, pg. 308.

Dec. 1, 1903. Mandate issued.
" " " Original papers sent clerk.
Nov. 30, 1904. Entry of certification filed. Journal entry: On motion of the plaintiff in error, Fred C. Rector, trustee, this court orders it to be certified and made part of the record in this case, and the Honorable William T. Spear, chief justice of said supreme court, does now certify, that in said cause,
26 and on the hearing before this court, it was claimed, contended and alleged by the said plaintiff in error that, on the 10th day of April, A. D., 1900, Reinhard & Company, a partnership, by deeds of its individual members committed an act of bankruptcy, to-wit, made a general assignment for the benefit of its creditors; that on the 11th day of April, A. D., 1900, a petition in bankruptcy was filed in the district court of the United States of the southern district of Ohio, eastern division; that on the 10th day of August, A. D., 1900, said Reinhard & Company were, by said court, adjudged bankrupt, and on September 13, A. D., 1900, said plaintiff in error was appointed trustee thereof; that on the 10th day of April, A. D., 1900, said Reinhard & Company, then being to the knowl-

edge of the defendant in error, insolvent, assigned and transferred to the defendant in error, The Commercial National Bank, and that the said last named bank then and there received from said Reinhard & Company, the sum of $970.45 of monies belonging to said Reinhard & Company; that said assignment and transfer was an unlawful preference, given to the said defendant in error, and violated the provisions of sections 60*a* and 60*b* of the United States bankrupt law; that it became and was material to the said cause for this court to determine whether the said sum of $970.45 was so assigned and transferred; whether it was an unlawful preference; whether it was a violation of said section 60*a* and section 60*b* of the said bankrupt law; and whether the said plaintiff in error, under said law, was entitled to have the said assignment and transfer set aside and declared null and void, and to have a judgment and order for the recovery of said money against said defendant in error; that the decision of this court was adverse to the claims and contentions of the said plaintiff in error, in this, that said court decided that said assignment and transfer of said sum of $970.45 was not an unlawful preference, in violation of the said provisions of the bankrupt law, and that the said plaintiff in error was not deprived of any right under said law, and was not entitled to have said assignment and transfer set aside, and to recover the said sum of $970.45 from said defendant in error.

Journal No. 20, p. 82.

Nov. 30, 1904. Petition for writ of error filed.
" " " Bond filed. (In duplicate)
" " " Citation filed.
" " " Waiver filed.
" " " Writ of error filed.
" " " Assignment of errors filed.

27 The Supreme Court of the State of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Authorized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error. } No. 8161.

Certificate.

On motion of the plaintiff in error, Fred C. Rector, trustee, this court orders it to be certified and made part of the record in this case, and the Honorable William T. Spear, chief justice of said supreme court does now certify, that in said cause, and on the hearing before this court, it was claimed, contended and alleged by the said plaintiff in error that, on the 10th day of April, A. D. 1900, Reinhard & Company, a partnership, by deeds of its individual members,
28 committed an act of bankruptcy, to-wit, made a general assignment for the benefit of its creditors; that on the 11th day of April, A. D., 1900, a petition in bankruptcy was filed in the district court of the United States of the southern district of Ohio, eastern division; that on the 10th day of August, A. D., 1900, said Reinhard & Company were, by said court, adjudged bankrupt, and on September 13, A. D., 1900, said plaintiff in error was appointed trustee thereof; that on the 10th day of April, A. D., 1900, said Reinhard & Company, then being, to the knowledge of the defendant in error, insolvent, assigned and transferred to the defendant in error, The Commercial National Bank, and that the said last named bank then and there received from said Reinhard & Company, the sum of $970.45 of monies belonging to said Reinhard & Company; that said assignment and transfer was an unlawful preference, given to the said defendant in error, and violated the provisions of sections 60*a* and 60*b* of the United States bankrupt law; that it became and was material to the said cause for this court to determine whether the said sum of $970.45 was so assigned and transferred; whether it was an unlawful preference; whether it was a violation of said section 60*a* and section 60*b* of the said bankrupt law; and whether the said plaintiff in error, under said law, was entitled to have the said assignment and transfer set aside and declared null and void, and to have a judgment and order for the recovery of said
29 money against said defendant in error; that the decision of this court was adverse to the claims and contentions of the said plaintiff in error, in this, that said court decided that said assignment and transfer of said sum of $970.45 was not an unlawful preference, in violation of the said provisions of the bankrupt law, and that the said plaintiff in error was not deprived of any right under said law, and was not entitled to have said assignment

and transfer set aside, and to recover the said sum of $970.45, from said defendant in error.

WILLIAM T. SPEAR,
Chief Justice of Supreme Court of the State of Ohio.

30 Supreme Court of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Duly Authorized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error. } No. 8161.

Petition for Writ of Error.

The petition of Fred C. Rector, trustee of Reinhard & Company, by Pugh & Pugh and Fred C. Rector, his attorneys, hereby sets forth that on the 24 day of November, 1903, the supreme court of the State of Ohio made and entered a final order and judgment herein, in favor of the Commercial National Bank, above named, in which final order and judgment, and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the said Fred C. Rector, trustee, all of which will more in detail appear from the assignment of errors which is filed with this petition.

31 That the said supreme court of the State of Ohio is the highest court of the said State of Ohio in which a decision in this suit and in this matter could be had.

Wherefore, the said Fred C. Rector, trustee, as aforesaid, petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the supreme court of the State of Ohio for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 14th day of November, A. D., 1904.

FRED C. RECTOR,
Trustee, &c., Petitioner,
By PUGH & PUGH,
D. F. PUGH, AND
FRED C. RECTOR,
His Attorneys.

The writ of error as prayed for, in the foregoing petition, is hereby allowed, this 14th day of November, A. D., 1904, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at $500.00.

Dated at Columbus, this 14th day of November, A. D., 1904.

WILLIAM T. SPEAR,
Chief Justice Supreme Court of the State of Ohio.

Filed in my office this — day of November, A. D., 1904.

———, Clerk of the Supreme Court of the State of Ohio.

32 The Supreme Court of the State of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Authorized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error. } No. 8161.

Bond.

Know all men by these presents, that we, Fred C. Rector, trustee of Reinhard & Company, and Lewis L. Rankin, as surety are held and firmly bound unto the Commercial National Bank, a corporation, duly authorized, incorporated and existing under the national banking laws of the United States, in the sum of $500.00, to be paid to the said obligee; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, and severally, firmly by these presents.

33 Sealed with our seals and dated this 14th day of November, A. D., 1904.

Whereas the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the supreme court of the State of Ohio:

Now, therefore, the condition of this obligation is such that, if the above named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages in case he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and effect.

FRED C. RECTOR,
Trustee of Reinhard and Company, Bankrupts.
L. L. RANKIN.

STATE OF OHIO, } *ss:*
County of Franklin, }

On this 14th day of November, 1904, before me, personally appeared Fred C. Rector, trustee as aforesaid, to me known to be the person described in, and who executed, the foregoing bond, and acknowledge that he executed the same as his free act and deed.

[Notarial Seal, Franklin County, Ohio.]

B. C. BLACHLEY,
Notary Public in and for Franklin County, Ohio.

34 STATE OF OHIO, Franklin County, } ss:

On this 14 day of November, 1904, before me personally appeared Lewis L. Rankin, to me known to be the person described in, and who executed, the foregoing bond, and acknowledged that he executed the same as his free act and deed.

[Notarial Seal, Franklin County, Ohio.]

B. C. BLACHLEY,
Notary Public in and for Franklin County, Ohio.

I hereby approve of the foregoing bond and sureties, this 17th day of November, 1904.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

35 THE UNITED STATES OF AMERICA, ss:

To the Commercial National Bank, a corporation duly authorized, incorporated, and existing under the national banking laws of the United States, Greeting:

You are hereby cited and admonished to be, and appear at, a Supreme Court of the United States, at Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein Fred C. Rector, trustee of Reinhard & Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the chief justice of the supreme court of the State of Ohio, this 14th day of November, 1904.

WILLIAM T. SPEAR,
Chief Justice of the Supreme Court of the State of Ohio.

Attest:

[Seal of the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON, *Clerk*,
Clerk of the Supreme Court of the State of Ohio.

Columbus, Ohio, November 14th, 1904.

36 I, attorney of record, for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance to *them* in the Supreme Court of the United States without prejudice and reserving all questions as to jurisdiction &c.

F. F. D. ALBERY,
Attorney for Defendant in Error.

Nov. 22d 1904.

37 FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Duly Authorized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error. } No. 8161.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of Ohio, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Fred C. Rector, trustee of Reinhard & Company, and the Commercial National Bank, a corporation, duly authorized, incorporated and existing under the national banking laws of the United States, wherein was drawn in question the validity of the bankrupt statute of the United States of 1898, and also the construction of said statute, and the decision was against the
38 validity of the said statute, and against the right, title, and privilege set up and claimed under said statute, a manifest error hath happened, to the great damage of the said Fred C. Rector, trustee as aforesaid, as by his claim plainly appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, and with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 14 day of December, 1904, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws in question of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26″ day of November, in the year of our Lord, 1904.

[Seal United States District Court, Southern Dis. Ohio.]

B. R. COWEN,
Clerk of the District Court of the United States
for the Southern District of Ohio.

39 Supreme Court of the State of Ohio.

FRED C. RECTOR, Trustee of Reinhard & Company, Plaintiff in Error,
vs.
THE COMMERCIAL NATIONAL BANK, a Corporation Duly Authorized, Incorporated, and Existing under the National Banking Laws of the United States, Defendant in Error. } No. 8161.

Assignment of Errors.

Now comes the plaintiff in error, Fred C. Rector, trustee as aforesaid, and in connection with his petition for a writ of error herein, respectfully submits that in the record proceedings, decision and final judgment of the supreme court of the State of Ohio, in the above entitled matter and cause, there are manifest errors, to-wit:

First. Said supreme court erred in deciding, as it did, that the transfer, assignment and payment of $970.45, made on the 10th day of April, A. D., 1900, by the clearing house of Columbus, Ohio,
40 for said Reinhard & Company, to the defendant in error, The Commercial National Bank, was not a preference, in violation of the terms and provisions of section 60*a* and section 60*b* of the United States bankruptcy law of 1898.

Second. Said supreme court erred in deciding, as it did, that said Reinhard & Company did not assign, transfer and pay the said sum of $970.45 to the said The Commercial National Bank, defendant in error.

Third. Said supreme court erred in deciding, as it did, that the said clearing house, or the manager thereof, was not clothed with power to pay, assign and transfer the said sum of $970.45, for said Reinhard & Company to the said The Commercial National Bank, in the absence of the prohibition of said section 60*a* and section 60*b* of the said bankruptcy law.

Fourth. Said supreme court erred in holding, as it did, that the said plaintiff in error had no right, under the provisions of said section 60*a* and section 60*b* of the said bankrupt law, to have the said payment, assignment and transfer of said $970.45, made as aforesaid, by said clearing house or its manager, for said Reinhard & Company, to said Commercial National Bank, declared null and void, and set aside, and said amount of $970.45 refunded to said plaintiff in error, by said The Commercial National Bank, as a preference, in violation of the provisions of said section 60*a* and section 60*b* of said bankrupt law.

Fifth. Said supreme court erred in holding and deciding,
41 as it did, that the common pleas court of Franklin county, Ohio, did not err in rendering its judgment in said cause against the plaintiff in error, dismissing said cause.

Sixth. Said supreme court erred in holding, as it did, that the circuit court of Franklin county, Ohio, did not err in affirming the judgment of the said common pleas court.

Seventh. Said supreme court erred in refusing to reverse the said judgment of affirmance, rendered by the said circuit court, and in its refusal to reverse the judgment of the said common pleas court.

Eighth. Said supreme court erred in deciding, as it did, that because the manager of the clearing house, before the payment, assignment and transfer of the $970.45, had notice of the assignment by Reinhard & Company, of all its property for the benefit of its creditors, his agency, or the agency of the clearing house, for said Reinhard & Company, was thereby terminated.

Ninth. Said supreme court erred in deciding, as it did, that the requirement of the rule of the clearing house prevented the payment, assignment and transfer of the said sum of $970.45 to said defendant in error from being an unlawful and voidable preference under the said bankrupt law.

FRED C. RECTOR, Trustee,
By PUGH & PUGH,
D. F. PUGH, &
FRED C. RECTOR,
His Attorneys.

42 Supreme Court of the State of Ohio.

STATE OF OHIO, }
City of Columbus, }

I, Lawson E. Emerson, clerk of the supreme court of Ohio, do hereby certify that the foregoing petition for writ of error, bond, citation and waiver of service, writ of error and assignment of errors in the case of Fred C. Rector, trustee of Reinhard & Company, plaintiff in error, *vs.* The Commercial National Bank, a corporation etc., defendant in error; that the printed copy of the record attached hereto is a true and correct copy of the printed record, filed in said supreme court and used in the consideration of said cause, and that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said supreme court this 1st day of December, A. D., 1904.

[Seal the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, Deputy.

43 In the Supreme Court of Ohio.

THE STATE OF OHIO, }
City of Columbus. }

To the honorable the Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, send, as within we are commanded.

In witness whereof, I, Lawson E. Emerson, clerk of the supreme court of Ohio, have set my hand and seal of said court, this 1st day of December, A. D., 1904.

[Seal the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, Deputy.

Endorsed on cover: File No. 19,562. Ohio supreme court. Term No. 138. Fred C. Rector, trustee of Reinhard & Company, plaintiff in error, *vs.* The Commercial National Bank. Filed December 12th, 1904. File No. 19,562.

FILE COPY.

(19,562)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 138.

Office Supreme Court U. S.
FILED
DEC 7 1905
JAMES H. MCKENNEY,
Clerk.

FRED C. RECTOR, TRUSTEE OF REINHARD & COMPANY,

PLAINTIFF IN ERROR,

vs.

THE COMMERCIAL NATIONAL BANK,

DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

D. F. PUGH,
PUGH & PUGH,
FRED C. RECTOR,
Attorneys for Plaintiff in Error.

F. B. TOOTHAKER, Law Printer, 749 N. Third St., Columbus, O.

(19,562)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 138.

FRED C. RECTOR, TRUSTEE OF REINHARD & COMPANY,

PLAINTIFF IN ERROR,

vs.

THE COMMERCIAL NATIONAL BANK,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff in error, as trustee in bankruptcy of Reinhard & Company, brought an action in the Common Pleas Court of Franklin county, Ohio, against the defendant in error, to recover the sum of $970.45. The petition asserts that plaintiff was, on the thirteenth day of September, A. D. 1900, duly appointed trustee of Reinhard & Company, bankrupts, and that he accepted said trust, and duly qualified, and had been legally acting as trustee; that on August 10, 1900, in the proceedings then and there pend-

ing for that purpose in the District Court of the United States for the Southern District of Ohio, Eastern Division, the said Reinhard & Company were adjudged bankrupts, and that said petition for adjudication was duly filed in said court on April 11, 1900; that the defendant in error was duly incorporated under the national banking laws of the United States; that on April 10, 1900, said Reinhard & Company, a partnership, consisting of John G. Reinhard and Henry A. Reinhard, made a general assignment for the benefit of their creditors; that on April 10, 1900, said Reinhard & Company assigned and transferred to the defendant in error, and the defendant in error then and there received of the moneys belonging to said Reinhard & Company, $970.45; that said payment was made for the purpose of giving an unlawful and fraudulent preference to said defendant in error, and was received by it for such purpose, and that said transfer was made to defraud the creditors of said Reinhard & Company.

The answer of the defendant in error admitted all the allegations of the petition, except two allegations, to wit:

(1) That Reinhard & Company assigned and transferred to it, and it received from Reinhard & Company the payment of the money; and,

(2) That the payment was made for the purpose of giving an unlawful and fraudulent preference, and was for the purpose of defrauding the creditors of Reinhard & Company.

The case was tried in the Common Pleas Court, upon the petition and answer, and an agreed statement of facts, which will be found on pages 10 and 11 of the Record.

The Common Pleas Court rendered a judgment, upon the issues joined and the agreed statement of facts, against the plaintiff in error, and dismissed his action at his costs.

The case was taken by the plaintiff in error to the Circuit Court on error, for the purpose of obtaining a reversal of the judgment of the lower court, but the Circuit Court affirmed the judgment of the Common Pleas Court.

We do not know why the Common Pleas Court rendered the judgment against the defendant in error. The Circuit Court delivered an opinion in which it assigned a reason for its conclusion. The opinion was delivered in this case, and also in the case of Fred C. Rector, trustee of Reinhard & Company, bankrupts, against the City Deposit Bank, now pending in this court. This fact explains why the court, in the opinion, speaks of more than one case. The opinion is couched in the following language:

"The facts in these cases are not the same, but in the opinion of the court each must be, in these proceedings in error, disposed of on the same ground, and for that reason one opinion will answer for both.

"The cause of action in each case is that a voidable preference had been given by Reinhard & Company, insolvent debtor, to each of the defendant banks on which the trustee seeks to recover.

"In our opinion no preference was shown. Reinhard & Company gave nothing to within banks. The proof does not show that the manager of the Clearing House had any authority to do what he did. The business of the ninth of April was closed, and the rule offered in evidence prescribes what was to be done when a clearing house check was not paid. That check was not to be carried into the next day's business, but the amount of that check was to be pro-rated by the banks that had on the ninth cleared checks on Reinhard & Company, and each of these banks was to have a claim, not against the Clearing

House, but against Reinhard & Company, for its pro-rata part of the amount of that check.

"Under the proof, the manager of the Clearing House, as agent of Reinhard & Company, was not clothed with power to apply their credit or funds of the tenth to the payment of the check of the ninth, and if he had been he had notice of the assignment before he attempted to exercise the power, and his agency was thus terminated.

"It may be that the contention of counsel for the trustee is sound, and as to that we express no opinion, but if it is, we are inclined to the opinion that they may recover as for a conversion; and being of the opinion that the cause of action stated in the petition is not made out by the proof, it follows that the judgments are affirmed.

"SUMMERS, J."

A reference to the agreed statement (Record, page 10) will indicate that much of the above opinion is not applicable to the case at bar. The Supreme Court affirmed the Circuit Court.

The theory of the plaintiff in error is that there was an unlawful preference given to the defendant in error, as a creditor of Reinhard & Company, bankrupts, in violation of the United States bankruptcy laws.

The section of the bankrupt law, which we contend was violated by the payment of the $970.45, to the defendant in error, is Section 60*a* and Section 60*b*.

Section 60*a* is thus expressed:

"A person shall be deemed to have given a preference is, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60*b* provides:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The term "transfer" used in the law quoted, is defined by Section 1 of the bankrupt statute to "include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

To establish a case of preference, the plaintiff in error was required to prove the following facts:

(1) That a petition, praying that Reinhard & Company should be adjudged bankrupts, was filed in the United States District Court in bankruptcy.

(2) That Reinhard & Company were, by the said court, adjudged bankrupts.

(3) That some of the property of Reinhard & Company was transferred to the defendant in error.

(4) That Reinhard & Company was, at that time, insolvent.

(5) That the said transfer was made within four months before the filing of the petition, or after the filing of the petition, and before the adjudication.

(6) That the effect of the transfer was that the defendant in error obtained a greater percentage of its claim against Reinhard & Company than any of the other creditors of the same class.

(7) That the transfer of the property was made by Reinhard & Company, or its agent.

(8) That the defendant in error, or its agent, "acting therein," had reasonable cause to believe that a preference was intended to be given by the transfer.

All of the essential facts were, we submit, proved by the plaintiff in error.

It is admitted by the agreed statement of facts, and by the answer of the defendant in error:

(1) That on the eleventh day of April, 1900, a petition was filed in the District Court of the United States praying that Reinhard & Company should be adjudged bankrupts.

(2) That on August 11, 1900, they were adjudged bankrupts.

(3) That on April 10, 1900, Reinhard & Company were insolvent.

(4) Notwithstanding the answer denied, impliedly, that some of the property of Reinhard & Company was, on the tenth day of April, 1900, transferred to the defendant in error, the agreed statement of facts states explicitly that the manager of the Clearing House found a balance was due on that day, to Reinhard & Company, from the Clearing House; and that, "out of the balance he gave a check for $——— to the City Deposit Bank, and for the balance of $970.45 gave a check to the Commercial National Bank;" that Mr. Field, the manager of the Clearing House, went to the bank of the defendant company in error, "to return the checks which they had cleared on Reinhard & Company that day," and that when he did this "he informed Mr. Hoffman, the cashier, that that

bank (Reinhard & Company) had suspended, and that he had a balance on hand due Reinhard & Company of $———, $——— of which he was going to pay to the City Deposit Bank, leaving a balance of $970.45 due the said Reinhard & Company, which he did not know what to do with. Mr. Hoffman informed him that he had advanced Reinhard & Company $2000.00 on that morning, and suggested that he pay the balance to him. He agreed to this and gave him the check as suggested."

These statements of admitted facts demonstrate that the relation of creditor and debtor, then existed between the defendant in error and Reinhard & Company; that the $970.45 belonging to Reinhard & Company was "then and there" paid and transferred to the defendant in error.

(5) The payment of the $970.45 having been made on the tenth day of April, 1900, and the petition for the adjudication having been filed on the eleventh day of April, 1900, no further evidence was required to prove that the transfer or payment was made within four months before the filing of the petition for adjudication.

(6) Reinhard & Company being insolvent on the tenth day of April, 1900, as the agreed statement of facts shows, they were not able to pay all of their debts. An insolvent person, company or firm, is not, generally, in a condition to pay all his or its debts. Universal experience teaches this. The very meaning of the term "insolvent," as defined by the bankrupt statute is that the insolvent is not able to pay his debts in full. This is the definition:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property exclusive of any property which he may have conveyed,

transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Section 1, clause 15, of the Bankrupt Act.

The defendant in error received 100 per cent. of its claim; the $970.45 paid every cent of its claim. But inasmuch as the aggregate of Reinhard & Company's property, on the tenth of April, 1900, fairly valued, was not sufficient in amount to pay its debts (for that was the meaning of their insolvency under this law), it is evident that the effect of the transfer of the property, or the payment of the $970.45, to the defendant in error, was that it obtained a greater percentage of its claim than the other creditors will.

(7) The transfer of the property, the payment of the $970.45, was made, indirectly, by Reinhard & Company, that is, by its agent. It was not necessary that the payment should be made directly by Reinhard & Company; the payment made by its agent had the same effect as if it had been made by Reinhard & Company.

"Mode of Transfer Immaterial.—If the transfer does diminish the assets of the bankrupt's estate, and it is done to give one creditor an advantage over another, then whatever may be the mode of transfer, or however intricate or circuitous the means by which it was carried into execution, it will constitute a preference."

Collier on Bankruptcy, p. 356.

The rule, or proposition of law stated by the author is illustrated by two cases:

Gibson vs. Dobie, 5 Bliss., 198; Fed. Cas., 5394.
In Re Waite, 1 Low., 207; Fed. Cas., 17044.

The undisputed fact is that the defendant in error was paid $970.45, which belonged to Reinhard & Company. The effect of this was to reduce the assets of Reinhard & Company, when insolvent, to the harm of their other creditors. The fact that it was paid indirectly, circuitously to the defendant in error, was, as the authorities show, immaterial. Assume for the purpose of the argument, that it was not made by Reinhard & Company, or their agent. Still, the fact is that a preference was given and received. The case of in Re Lyon, 114 Fed. Rep., 327, illustrates and enforces this point.

In the Lyon case the court laid down the principle that a creditor receives a preference when there is actually transferred to him, whether directly or indirectly, either in money or in other value, a part of the debtor's property, the debtor being insolvent.

(8) But there is another reason.

The Clearing House, and its manager, were agents of each and all of the banks that belonged to the Clearing House Association.

A clearing house is an association of banks created by voluntary contract entered into by and between them. In Merchant's Bank vs. Bank of the Commonwealth, 139 Mass., 513, on pages 517 and 518, Judge Devins, defining the Clearing House Association, said:

> "By a contract between them an association is formed which is their common banker."

In Yardley vs. Philler, 167 U. S., 354, 359, on this same subject, it was said:

> "It is obvious that the Clearing House Association was an agent or fiduciary representative of all the banks forming the association." (Page 359 of the report.)

The payment of the $970.45 to the defendant in error was made, in a circuitous way; still it was made by the agent of Reinhard & Company, and it stands in the contemplation of law, just as if it had been made by Reinhard & Company directly.

(9) There can be no doubt suggested as to whether the defendant in error was a creditor of Reinhard & Company. The agreed statement of facts admitted that Reinhard & Company kept an account with the defendant in error, and that on the morning of April 10, 1900, the balance due from the defendant in error to Reinhard & Company, was $1067.76; that afterwards, on the same day, Reinhard & Company had a draft on a New York bank for $2000.00 cashed by the defendant in error; that during the day the defendant in error "learned by street rumor that Reinhard & Company's draft for New York would probably not be paid, and it charged the same back on the account of Reinhard & Company, which overdrew their account $932.24."

All of this is an admission that the relation of creditor and debtor existed on the tenth day of April, 1900, between the defendant in error and Reinhard & Company.

(10) The next and last question is, did the defendant in error or its "agent acting therein," borrowing the language from the statute, have, on April 10, 1900, when the payment of $970.45 was made to it, "reasonable cause to believe that it was intended thereby to give a preference?"

The plaintiff in error had to prove that the defendant in error had such reasonable cause. The meaning of the statutory requirement is not what it seems to be on its

surface. The plaintiff in error complied with the statute, for he proved that the defendant in error had reasonable cause to be put upon inquiry as to whether a preference was actually given or not. This is what the statute means.

Certainly there can be very little doubt about the fact that the bank had knowledge of the insolvency of Reinhard & Company. The bank, through its officers, heard the street rumor and knew that the checks of Reinhard & Company had not cleared when the manager of the Clearing House came and made the announcement of the fact.

The rule as to the decree of proof required of the plaintiff in error is correctly stated by Mr. Loveland in his work entitled, "Law and Proceedings in Bankruptcy," Section 194, pages 468, 470, 471.

Certainly the defendant in error must admit that it knew it was getting 100 per cent. of its claim against Reinhard & Company and it was bound to know, also, under the provisions of the bankrupt law that a bank which could not pay a $2000.00 draft and which had suspended payment was insolvent and would not pay its creditors in full.

In Re Bashlin, 109 Fed. Rep., 96, discussing the meaning and purpose of the bankrupt statute as to preferences, Judge Buffington said:

> "It will be noted that insolvency and the effect of the transfer are the sole tests prescribed by this subdivision. The question of the intent of either the debtors or the creditors are not made elements, but the fact of the debtor's insolvency and the effect of the transfer determine the character as a preference of the payment."

The Federal Courts have, repeatedly, declared that the two controlling purposes of the bankrupt statute are:

(1) "The protection and discharge of the bankrupt; and

(2) "The distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors."

What Justice Field, in Toof vs. Martin, 13 Wall., 40, 51, said of another bankrupt statute is equally relevant to the present statute, thus:

"The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer, made with a view to secure the property, or any part of it, to any one, and thus prevent such equal distribution, is a transfer in fraud of the act."

Has this Court Jurisdiction?

In the case at bar decision was made against a title claimed under the Bankruptcy Act of 1898.

On April 10, 1900, The Commercial National Bank learned from street rumor that Reinhard & Company's draft on New York, the same having been given to The Commercial National Bank on the morning of that day and amounting to $2000.00, would not be paid, and charged the same back to the account of Reinhard & Company, its customer, thereby overdrawing the account of Reinhard & Company $932.24. On the same day Reinhard & Company sent their representative to the Clearing House as usual, and at 12:30 p. m. they received checks from the Clearing House as usual which were cleared on the respective banks. At 1 o'clock of the same

day the Clearing House manager, having made his adjustment of balances for that day and having made out checks to pay for the same, received back the checks which the different banks of the Clearing House had cleared on that day on Reinhard & Company. The manager took these checks to the different banks that had cleared them and deducted the amount of their clearings that day. This left a balance of several hundred dollars due Reinhard & Company from the Clearing House for that date. Among other places its manager, Mr. Fields, went to The Commercial National Bank and informed the cashier that the bank of Reinhard & Company had suspended and that he had this balance of the money of Reinhard & Company, and thereupon the cashier informed him of the overdraft that Reinhard & Company owed The Commercial National Bank amounting to $940.70, and he suggested that the manager of the Clearing House give to him this amount of money of the property of Reinhard & Company. All this was done. Reinhard & Company at this time had suspended payment and were insolvent and each of the partners were insolvent, all to the knowledge, legally speaking, of The Commercial National Bank. It thus appears that the title to this property remained in Reinhard & Company up to the time of the adjudication, and thereafter passed, by virtue of the Bankrupt Act, to the trustee, the plaintiff in error, and that the State courts, by refusing to award judgment to the plaintiff in error rendered a decision against a title of a trustee in bankruptcy claimed under the Bankruptcy Act.

The petition filed in the State Court (see Record, p. 7), after reciting the bankruptcy of Reinhard & Company and the plaintiff's appointment as trustee, alleges that on the

day prior to the filing of the petition in bankruptcy the firm of Reinhard & Company, for the purpose of giving an unlawful preference under the provisions of the Bankruptcy Act, transferred $970.45 to The Commercial National Bank. Only by virtue of the provisions of the Bankruptcy Act can the trustee recover the money so illegally transferred. The transfer or appropriation of this money was no preference under State law. It was clearly such under the bankruptcy law because it was taken by a creditor of an insolvent concern, Reinhard & Company, and applied toward the payment of a debt. Therefore the decisions of the State Courts denying the relief were decisions against a title claimed under a federal law.

It may be that upon the face of the petition the federal question appears in language that may be called general. A reference to the certificate (see Record, page 15), shows that it makes more specific what may be otherwise general. The certificate may be relied upon for this purpose.

Parmalee vs. Lawrence, 11 Wallace, 36;
Lawler vs. Walker, 14 Howard, 149;
Brown vs. Atwell, 97 U. S., 327.

Be it remembered that the trustee was compelled to bring this case in the State Court, the amendment to the Bankruptcy Act conferring concurrent jurisdiction of all such matters on Federal Courts having been passed subsequent to the filing of this case in the State Courts. Under the code the trustee was compelled to plead the ultimate fact. Had he averred in so many words that the transfer was an unlawful preference under the provisions of Sections 60*a* and 60*b* such allegations might have been stricken out of his petition as immaterial, and because they pleaded the law.

The trustee had title to the money, which was given to the defendant bank without authority, because it was the money of Reinhard & Company, and by virtue of the Bankruptcy Act the title passed to the trustee upon the adjudication of Reinhard & Company as bankrupts. This fact deprives the defendant in error of any consolation in the case of Cramer vs. Wilson, 25 Sup. Cr. Rep., 94.

The question in the case at bar was whether, the bankrupt having had the title to the money so transferred or appropriated, such title would pass to the trustee. It can not be said that the title of the bankrupt to this money is seriously questioned. The bank could have appropriated the money to its own use and could have applied it to the indebtedness of Reinhard & Company to the bank upon no other theory than that the money was the property of Reinhard & Company, the debtor of The Commercial National Bank. Therefore our case is in line with Williams vs. Herd, 140 U. S., 529, S. C.; 11 Sup. Ct. Rep., 885, wherein this proposition was announced:

> "Where a State court decides against the claim of the assignee in bankruptcy to certain of the bankrupt's property under Rev. St. U. S., Chap. 5044, the decision is against a 'right' or 'title' claimed under the statute of the United States within the meaning of Rev. St., Sec. 709, and its judgment is subject to review by the Supreme Court of the United States."

The intervening unlawful and fraudulent preference under the bankrupt act prevented the title to this money, taken by the bank (defendant in error), from ever vesting in it. Therefore, prior to the adjudication, the title vested in Reinhard & Company, and upon adjudication, in the trustee. The trustee now claims the money under the provisions of a federal statute.

Much reliance is placed by the other side on the case of Thompson vs. Fairbanks, 196 U. S., 515. The syllabus in that case has no reference whatever to the point under discussion. It is said in the opinion, on page 523 (and this is apparently the statement in the case upon which the other side rely):

> "The question whether the conveyance, etc., was in fact made with intent to defraud the creditors, when passed upon in the state courts, is not one of a federal nature."

We are not asking this court to determine whether the intention of The Commercial National Bank in appropriating and applying to its claim the money of Reinhard & Company was an intent to defraud the creditors of Reinhard & Company, but whether or not the transfer was one constituting a *preference* within the provisions of the bankrupt law. This court considered the question as to whether a judgment and execution might be held to have been a preference committed by a bankrupt so as to amount to a violation of the bankrupt act in the case of Wilson vs. Nelson, 183 U. S., 191, and in fact in Thompson vs. Fairbanks, supra, the question is also considered. It is our contention that by the undisputed evidence in the case at bar a preference is shown and that a right exists under the Federal Bankrupt Act in favor of the trustee to recover; and that this right, claimed by virtue of the federal statute, has been denied.

It was said by Chief Justice Waite, in Chapman vs. Goodnow, 123 U. S., 540-548:

> "If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much

against the right, within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

In the case at bar the right of the trustee in bankruptcy to recover was based upon a federal statute alone, and when the recovery was denied him a right claimed under the federal statute was refused. Is not this condition covered by the statement of Chief Justice Waite just referred to?

In Wilson Brothers vs. Nelson, 183 U. S., 191, this court held that the act of 1898 makes the result obtained by the creditor, and not the debtor's specific intent, the essential element of a preference.

CONCLUSION.

For the above reasons we contend that the judgments of the State Courts should be reversed.

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Attorneys for Plaintiff in Error.

NOTE.—As this cause is heard at the same time the case of Fred C. Rector, Trustee, Plaintiff in Error, vs. City Deposit Bank (No. ——), is heard, and as the same question of jurisdiction is discussed in the briefs there filed, we ask the court to look at them.

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Clerk.

(19,562)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 138.

FRED C. RECTOR, TRUSTEE OF REINHARD & COMPANY,

PLAINTIFF IN ERROR.

vs.

THE COMMERCIAL NATIONAL BANK,

DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR UPON MOTION TO DISMISS FOR WANT OF JURISDICTION.

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STATEMENT OF THE CASE.

On the first of December, 1900, the plaintiff in error in this case filed his petition in the Common Pleas Court of Franklin county, Ohio, in which, after averring his appointment as trustee, etc., and the corporate capacity of the defendant, he alleged "that on April 10, A. D. 1900, the said Reinhard & Company assigned and trans-

ferred to the Commercial National Bank and the said Commercial National Bank received of the monies belonging to said Reinhard & Company $970.45. Plaintiff says that said payment to the Commercial National Bank was made for the purpose of giving an unlawful and fraudulent preference to said The Commercial National Bank and was by it for such purpose so received and said transfer was made to defraud the creditors of said Reinhard & Company. Wherefore the plaintiff, etc., prays judgment against the Commercial National Bank for $970.45 with interest, etc." The answer of the defendant explicitly denied these allegations and further denied that there was anything due from it to Reinhard & Company or the plaintiff or that it had in its possession any money or property of any description belonging to said bankrupts or the plaintiff as their trustee and prayed dismissal, etc.

The case was submitted to the court on the following agreed statement of facts:

AGREED STATEMENT OF FACTS.

For ten years or more prior to April 10, 1900, Reinhard & Company kept an open account with the Commercial National Bank, depositing their outside items on places where they had no correspondent, for the purpose of saving themselves the exchange or collection charges on some of these items. The balance with the Commercial National Bank on the morning of April 10, 1900, was ten hundred and sixty-seven and 76-100 dollars ($1067.76). On that morning John G. Reinhard came to the Commercial National Bank with Reinhard & Company's draft on

New York for two thousand ($2000.00) dollars, for which the Commercial National Bank gave him the currency. This money was used by Reinhard & Company to pay checks drawn on them, and was paid out over their counter on April 10 to their customers.

At 12:15 o'clock, p. m., on said day, Reinhard & Company, a partnership, composed of John G. Reinhard and Henry A. Reinhard, said partnership and each of said partners being then insolvent, filed a deed of assignment in the Probate Court of Franklin county, Ohio, and at about the same hour and afternoon of said day, their banking house was closed, at the same time each of said partners filed deeds of assignment.

The following day a petition was filed in the District Court of the United States, for the Southern District of Ohio, by certain creditors, alleging that said assignment was an act of bankruptcy; and thereafter such proceedings were had that said Reinhard & Company were on August 11, 1900, adjudged bankrupt, and the plaintiff became their trustee, pending which election of trustee, one Walter Zinn was appointed and acted as receiver of Reinhard & Company, but the fact of such insolvency and the making of said assignment were not known to said the Commercial National Bank except by hearsay until after said amount of two thousand ($2000.00) dollars was charged back on the account of Reinhard & Company, and until after it had received the check of the manager of the clearing house for said sum of nine hundred and seventy and 45-100 ($970.45) dollars.

During said day of April 10, 1900, the Commercial National Bank learned by street rumor that Reinhard & Company's draft on New York would probably not be

paid, and it charged the same back on the account of Reinhard & Company, which overdrew their account nine hundred and thirty-two and 24-100 ($932.24) dollars.

On the tenth day of April, 1900, Reinhard & Company sent their representative to the clearing house as usual at 12:30 p. m. They received checks from the clearing house as usual which their representative took back to their bank, and the checks which they brought to the clearing house were cleared on the respective banks as usual in all cases. Then about 1 o'clock p. m., after the manager of the clearing house had made his adjustment of balances for the day and had made out the checks to pay for the same, Reinhard's representative brought back the checks which the different banks of the clearing house had cleared on them that day.

The manager took these checks back to the different banks that had cleared them and deducted the amounts of their clearings that day. This left a balance of $—— due to Reinhard & Company from the clearing house for that day. Out of this balance he gave a check for $—— to the City Deposit Bank, and for the balance of $970.45 he gave a check to the Commercial National Bank.

When Mr. Field, the manager of the clearing house, went to the Commercial National Bank to return the checks which they had cleared on Reinhard & Company that day he informed Mr. Hoffman, the cashier, that that bank had suspended, and that he had a balance on hand due Reinhard & Company of $———, $——— of which he was going to pay to the City Deposit Bank, leaving a balance of $970.45 due the said Reinhard & Company, which he did not know what to do with. Mr. Hoffman informed him that he had advanced Reinhard & Company

$2000.00 on that morning and suggested that he pay the balance to him. He agreed to this and gave him the check as suggested. Said amount was credited by the Commercial National Bank to Reinhard & Company, leaving a balance, as shown by the books of the Commercial National Bank, due from said bank to Reinhard & Company of thirty-eight and 21-100 ($38.21) dollars, which amount was paid over to Walter Zinn, as receiver of Reinhard & Company, upon his check as such receiver drawn on the Commercial National Bank on the sixteenth day of May, 1900.

The Common Pleas Court found in favor of the defendant. The case was then taken to the Circuit Court on error, which court found also in favor of the defendant and affirmed the judgment of the Common Pleas Court. The case was then taken to the Supreme Court of Ohio on error which court also affirmed the judgment of the Circuit and Comman Pleas Court, but made no report of the case, and the case is now in this court upon the writ of error which charges that in these proceedings there was drawn in question the validity of the bankrupt statute of the United States of 1898 and also the construction of said statute and the decision was against the validity of said statute and against the right, title and privilege set up and claimed under said statute.

The motion to dismiss is based upon the claim that "it appears by the record herein filed there was not drawn in question in said cause the validity of the bankruptcy statute of the United States of 1898 or the construction of said satute nor was the decision therein rendered against the validity of said statute or against any right, title or privilege set up or claimed under said statute." The

motion also contains a general allegation intended to cover the point that no federal question is involved in the proceeding.

Section 709 of the Revised Statutes determines what cases may be brought to this court on error from the courts of last resort of the several States and its provisions need not be repeated here except as they may arise in the discussion of this motion.

All that is claimed by the plaintiff in error as shown by the record is embraced in the certificate at page 15, the writ of error at page 19 and the assignment of errors at page 20. Previous to the certificate on page 15 there is nothing at all in the record showing that the plaintiff in error claimed that there was "drawn in question the validity of the bankrupt statute of the United States of 1898" or "the construction of said statute" or that "the decision was against the validity of said statute and against the right, title and privilege set up and claimed in said suit." A careful examination of this record will show at once that up to the point where the writ of error was issued the suit was nothing more nor less than an ordinary suit at law in which the plaintiff in error attempted to show that a fraudulent preference had been given contrary to law. The validity of the law was never in question nor was its construction. It was simply claimed that the facts agreed to constituted a fraudulent preference on the part of Reinhard & Company. Neither the constitutionality of the law nor its validity nor any question of right, privilege or title, in the sense of the law, were necessary to be considered by the court in determiining this question and it probably never occurred to the plaintiff in error until after the decision of the Supreme

Court of Ohio that such a question might be raised. It seems to be the intention of this statute that the Supreme Court of the United States shall have jurisdiction to review the decisions of the courts of last resort of the States in cases involving any question of conflict between state and federal law or authority, in matters relating to treaties, and matters in which the validity of a statute or an authority exercised under any statute, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and in cases where any title, right, privilege or immunity is claimed under the constitution, treaties or statutes or special authority involved under commissions of certain kinds.

It has been frequently decided that mere questions of construction either of federal or state laws will not be considered unless the question of their validity is involved.

Choteau vs. Marguerite, 12 Pet., 507.
Cook Co. vs. Dock Co., 138 U. S., 635.
Osborne vs. Florida, 164 U. S., 650.
Cameron vs. U. S., 146 U. S., 533.

It was not the intention to give a general review of all questions of law and fact involved.

Clipper Mfg. Co. vs. Eli, 194 U. S., 220.
Dewar vs. Richards, 151 U. S., 658.
Egan vs. Hart, 165 U. S., 188.
Thayer vs. Spratt, 189 U. S., 346.

This decision of the state court is final:

Kaufman vs. Treadway, 195 U. S., 271.

Even if the decision of the state court undertakes to construe a federal statute that does not give jurisdiction. Kennard vs. Nebraska, 186 U. S., 304.

Plaintiff in error undertakes to show that some title, right, privilege or immunity claimed under the federal law has been denied him. It is apparent, however, that what the statute means is not a mere matter of violation of a general statute of this nature which denies to all persons the privilege of holding property which has been received by them in fraud of the rights of general creditors of the bankrupt. In this respect the statute is not different from the statutes of many of the states forbidding fraudulent preferences in insolvency matters. (See R. S. Ohio, Secs. 6343-6344.) The law is general and applies to all bankrupts and to all persons dealing with them and is simply intended by its terms to insure as far as possible honest and fair dealings on the part of bankrupts to the end that the object of the bankrupt law may be attained. The bankrupt's trustee in bankruptcy therefore obtains no right, title or privilege as such under the various provisions of the statute. His rights can be worked out under the state law just as well (129 U. S., 506.) He is simply an intermediary and factor of the court appointed for the purpose of administering the estate according to the statute. In this case there was never any question as to his right to make the claim which he made. No right, title, or privilege was ever denied him. The record must show that he has been deprived of some title, right, privilege, or immunity secured

to him by the Constitution of the United States, which was specially set up or claimed in the state court.

Kennard vs. Nebraska, 186 U. S., 304; 191 U. S., 477.

If he failed to make out his case to the satisfaction of the state courts that was a mere matter of failure of proof or possibly a failure of the state courts to properly understand and apply the law to the facts, but that is very far from bringing the case within the provisions of section 709 and there was no decision at any time "against the right especially set up or claimed."

Dresser vs. Wilson, 195 U. S., 409.

Council for plaintiff in error proceeds upon the idea that his right, title, privilege, or immunity under the Constitution of the United States, is to have a judgment rendered in his favor, instead of a mere right to have his claim adjudicated.

This court has recently held in the case of Thompson vs Fairbanks, 196 U. S., page 516 (523) that

"The question whether any conveyance, etc., was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a federal nature."

McKenna vs. Simpson, 129 U. S., 506.
Cramer vs. Wilson, 195 U. S., 408.

The record must show that a federal question was raised in the state court in the manner in which a question of that nature should be raised by the state practice.

This court has distinctly decided in the case of Sayward vs. Denny, 158 U. S., 180, that it is not sufficient that this question shall first appear in the certificate of the presid-

ing judge of the state court, that there must have been "a definite issue as to the existence of the right distinctly deducible by the record before the state court can be held to have disposed of such federal question by its decision." The court went further and said that where a title, right, privilege or immunity was claimed it must be specially set up in order to give the Supreme Court jurisdiction.

Whatever the question is it must have been raised before the judgment of the Supreme Court of the State and if it relates to a title, right, privilege, or immunity, it must be especialy set up.

Yazoo & M. R. Co. vs. Adams, 180 U. S., 1.
Turner vs. Richardson, 180 U. S., 87.

It cannot be raised for the first time in the assignment of error.

Jacobi vs. Alabama, 187 U. S., 133.
Johnson vs. Insurance Co., 187 U. S., 491.

Moreover the record must show that the case in the state court "turned on the federal question" which was passed upon.

Detroit City Railway Co. vs. Guthard, 114 U. S., 136.
N. Y. C. & H. R. R. Co. vs. New York, 186 U. S., 269.

It is apparant from the decisions that the view which has been adopted of these provisions of the federal statute is that this court has jurisdiction only where a constitutional question is raised and the decision is against the constitutionality, where the questions involved are

solely federal constitutional questions and not questions of mere construction.

In the case of Huston & Texas Central R. R. Co., vs Texas, 177 U. S., page 78, it was distinctly laid down by this court that "the federal character of the suit must appear in the plaintiff's own statement of his claim."

When the judiciary act of 1891 was passed it was intended to relieve this court of many cases which heretofore had encumbered its dockets and stood in the way of expedition of the business of the court and it seemed at least to be in the mind of the Congress to leave with this court jurisdiction only of those weightier and more comprehensive questions involving conflict between state and federal authority, of constitutionality, etc. It certainly was not intended that the Supreme Court of the United States should be burdened with every case in which a trustee in bankruptcy had failed to make his point satisfactorily in the local courts that a fraudulent preference had been made. Such cases involve usually mere questions of fact and simple application of the law to those facts. I have been unable to see how such a federal question as is contemplated by law could by any possibility have been injected into this case unless the defendant in error had claimed in its answer that the provisions of the federal bankrupt law against fraudulent preference were unconstitutional. There never was any question of conflict of state laws with federal laws, there was no question of interpretation or construction (although it seems mere questions of construction are not within the perview of the law), no title, right, privilege or immunity, in the sense of the statute, was ever claimed by the plaintiff in error, and his mere assertion that there was drawn in

question the validity of the bankrupt statute of the United States of 1898 and also the construction of said statute and that the decision was against the validity of said statute and against the right, title and privilege set up and claimed under said statute, cannot determine the matter as against the record. Even the certificate of the Chief Justice of the Supreme Court of Ohio is powerless to determine such a matter as against the record, although a careful reading of the certificate of that court does not show that it went to the extent of so certifying. Put in a few words what the Supreme Court of Ohio says is simply that it heard and passed upon the questions that were made in the court below and found that the facts agreed upon did not constitute a violation of the bankrupt law and therefore that the plaintiff in error was not entitled to the relief which he demanded. We shall look in vain for anything in this certificate which indicates that the court had under consideration at any time any question of the validity of the bankrupt law, of its construction or of any right, title, or privilege set up and claimed under that statute by the plaintiff in error.

I.

ARGUMENT ON THE MERITS.

If the plaintiff in error has any remedy in this case it is very evident that he has mistaken that remedy by bringing the present suit. That was undoubtedly the view taken by the Ohio courts. The agreed statement of facts shows clearly that there was no transaction whatever between the bankrupt and the defendant in error and there is an

absolute failure of evidence to show that what was done was ever ratified by Reinhard & Company, so that it is not possible even by indirection to make out a contract or agreement of any kind between Reinhard & Company and the Commercial National Bank which would lay the foundation for the claim which is here made, and whatever the defendant in error may have been guilty of, there certainly is nothing in the transaction complained of which when analyzed bears the slightest resemblance to an unlawful preference under the bankrupt act. It does appear, however, that an hour or two before the act complained of Reinhard & Company fraudulently and by misrepresentation obtained $2000 of the money of the Commercial National Bank, that fraud and misrepresentation consisting in holding out the idea that its draft on New York for $2000 was good and would be paid and by concealing the actual facts in relation to its present condition. It was an easy thing to do at that time because Reinhard & Company then had on deposit with the Commercial National Bank a considerable sum of money and, so far as the evidence shows, there was no suspicion on the part of the defendant in error that Reinhard & Company were insolvent or that their draft would not be paid and the fact that the Trustee in this proceeding did not sue for the whole $2000 is an admission on his part that the Commercial National Bank had a right to protect itself in any way that it could under the circumstances and in the events that were then transpiring so rapidly. All of the facts contained in the agreed statement are practically simultaneous although the first one and the last one are separated by a few hours, yet it is as though Reinhard & Company had obtained $2000 in cash from the Commer-

cial National Bank by fraud and the fraud being discovered before the money was out of reach of the Commercial National Bank it had seized upon it *vi et armis* and recovered its own in that way.

I refer to these transactions in this way for the purpose of making clear the difference between what the defendant in error actually did and a fraudulent preference. To constitute a fraudulent preference there must be mutual understanding between the bankrupt and the creditor, there must be the intent to prefer and the intent to receive a preference; the preference must be fraudulent; the effect of it must be to work a fraud; the relation of creditor and debtor must exist; there must have been actual insolvency on the part of the bankrupt; the fact of the insolvency must have been known to the creditor and the debt must have been an antecedent debt.

I think I am justified in stating my proposition thus broadly although in the text books which we have on the subject the so-called elements of a fraudulent preferential transfer are usually boiled down to four or five propositions but a careful reading of the chapters in Loveland and in Collier devoted to this subject will justify the statements which I have made.

See Loveland on Bankruptcy, Chapter XVIII, particularly Sec. 194.
Collier on Bankruptcy, (3d edition) pages 341-348, 351-356.
Collier, (4th edition) pages 414-425.

The cases cited by these text writers are so numerous that I shall not attempt to refer to any of them but will content myself with the assertion that a careful reading of

these cases will justify the statement of the law which I have made.

In the present case none of these conditions existed either in actual fact or by inference of law.

To recur to the view taken by the Ohio Court: The facts contained in the agreed statement absolutely exclude any other view and, while I am willing to admit the soundness of certain propositions laid down by the plaintiff in error in his brief to the effect that many things may be done by indirection which the law will take cognizance of and will not permit parties to evade the law by the mere form of the transaction or the manner of it or the agency through which they carry it out, yet in this case I claim that justice can be done to all parties only by taking the facts as we actually find them and cutting off all inference and theory and deductions by which the courts are in the habit, under other circumstances, of arriving at just conclusions by disregarding the actual facts.

Here then we have a case in which the bankrupt itself must be absolutely excluded because it can not be claimed that it even placed its property in a position where it could be seized by the creditors whom it desired to prefer, because the balance in the clearing house was the result of the usual, ordinary and every day transactions carried on under the rules of the clearing house and which constitutes the business in which Reinhard & Company with the other banks of the city were engaged. There is nothing to show that Reinhard & Company knew anything about the transaction until after it had been accomplished and it does appear clearly that the defendant in error had no idea of what was to be done until the very

instant in which it was done and then neither the manager of the clearing house nor the defendant in error consulted Reinhard & Company about it.

The Circuit Court was therefore right in its conclusion.

It will be observed in this case that we are not mixed up in the transactions of the clearing house itself, that is to say our dealings with Rheinhard & Company involved in this litigation constitute a matter in which the clearing house and its membership do not figure at all. The manager of the clearing house as an individual upon our demand turned over to us so much money. He was not then acting for Reinhard & Company and if the facts stated are true could not possibly be considered as the agent of Rheinhard & Company. It was a voluntary matter on his part acting upon our demand. He alone took the responsibility and Rheinhard & Company were not consulted about it, had no hand in it, did not consent to it and therefore did not and could not intend a preference or make one even by the remotest indirection. The facts are absolutely against the trustee.

II.

But I am willing to follow counsel for the plaintiff in error in their argument of theory, inference and imagination in order to show that even upon their own ground they are not entitled to relief.

Let us then for the sake of the argument admit that the manager of the clearing house was the agent of Reinhard & Company and that the rumors which came to the defendant in error about the condition of Reinhard & Company were sufficient to put it upon its inquiry and that it was bound to know as matter of law that when Reinhard

& Company closed their doors they were "insolvent," whether or not there was actual property enough belonging to them to eventually pay their debts.

On the tenth day of April, 1900, Reinhard & Company obtained $2000 from the Commercial National Bank upon a draft drawn by them on New York and this money was paid out over the counter of Reinhard & Company to their customers. Later in the day the Commercial National Bank having heard the rumors and the hearsay statement of the manager of the clearing house seized upon whatever it could get to protect itself, $1067.76 of this money was in its own hands and $970.45 it took from the manager of the clearing house. Counsel for the plaintiff in error argue that the effect of what was done by the defendant in error was to give it "a greater percentage of its claim than the other creditors" and that the assets of Reinhard & Company were "diminished to the detriment of the other creditors." Is this true? Suppose that nothing at all had been done between the two banks on the tenth of April, there would have been in the hands of the Commercial National Bank $1067.76 belonging to Reinhard & Company which the trustee could have claimed. Suppose that instead of obtaining the $2000 from the defendant in error Reinhard & Company had drawn the $1067.76 and paid it out to its customers over its counter on that day. What difference would there be in the three transactions? Certainly only this; that in the first the $1067.76 would have been administered by the trustee as assets of the estate. In both the others the money would have gone "over the counter on April 10 to their customers," but in the second case the customers of Reinhard & Company would have got only

$1067.76 instead $2000. It is quite apparent then that the persons who received the preference, if there were any, were the "customers" of Reinhard & Company. The estate of Reinhard & Company was not diminished by any act of the defendant in error neither did the defendant in error receive a larger percentage on its claim than any other creditors of Reinhard & Company.

Or suppose that at the time the $2000 was obtained by Reinhard & Company security of some kind had been given by them to the Commercial National Bank is there any doubt that the transactions would have been valid?

In re Wolfe, 98 Federal Reporter, 84.
" Soudan Mfg. Co., 113 Federal Reporter, 804.
" Durham, 114 Federal Reporter, 750.
Young vs. Upson, 115 Federal Reporter, 192.
Stedman vs. Bank of Monroe, 117 Federal Reporter, 237.
Davis vs. Turner, 120 Federal Reporter, 605.
McNair vs. McIntyre, 113 Federal Reporter, 113.
In re Clifford, 136 Federal Reporter, 475.

The doctrine upon which this proposition rests is so claerly stated by the court in the case of the Soudan Manufacturing Co., 113 Federal Reporter, 804, that I can not refrain from quoting from the syllabus as well as the body of the decision.

Syllabus 1—

> "Under the bankrupt act of 1898, Sec. 67*d*, which provides 'that liens given or accepted in good faith and not in contemplation of, or in fraud upon, this act, and for a present consideration * * * * shall not be affected by this act,' the validity of a mortgage given to secure a present loan of money within four months prior to the borrower's bankruptcy does not depend upon his solvency at the time, or upon notice

of his financial condition by the mortgagee, actual or constructive, but to invalidate such a mortgage it must be shown that the borrower was insolvent; that the purpose of the loan was to accomplish unlawful preferences, or otherwise violate the act and that the lender knew or was chargeable with notice of both such facts."

Also from the opinion of the court, 809—

"In the bankrupt act of 1867 no express provision appears for this class of security but in Tiffany vs. Institution, 18 Wall. 375, 388, 21 L. ED., 868, the doctrine applicable to security given upon a present consideration was thus stated. 'There is nothing in the bankruptcy law which interdicts the lending of money to a man in Darby's condition (an insolvent), if the purpose be honest, and the object not fraudulent, and it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith and without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy and without it financial ruin would be inevitable. If the struggle to continue business be an honest one and not for the fraudulent purpose of diminishing his assets it is not only not forbidden but is commendable.' And it was upheld in conformity with the rule in England, 'that advances may be made in good faith to a debtor to carry on his business no matter what his condition may be and the party making these advances can lawfully take security at the time for their re-payment.'"

The fact is that so far as this particular transaction is concerned the relation of creditor and debtor never existed between the two banks.

"As soon as a banker is convinced that he is insolvent beyond remedy or hope of recuperation and

can not longer continue banking operations it becomes his duty to decline deposits and discontinue business."

Fruber vs. Stephens, 35th F. R., 77.
Chaffey vs. Fort, 2 Laws (N. Y., 81.)
Anonymous, 67 N. Y., 598.
Cragie vs. Hadley, 99 N. Y., 131.
52 Amer. Rep., 9.

"It is deemed a fraud upon the depositor for the bank to accept deposits upon the eve of suspension or to enter into new obligations and title to the deposits so received will remain in the depositor."

Sommerville vs. Beal, 49 F. R., 790.
Affirmed in 50th F. R., 647.
See also Wassen vs. Hawkins, 59 F. R., 233.
Martin vs. Webb, 110 U. S., 7.
St. Louis etc. R. Co. vs. Johnson, 113 U. S., 566.
Am. Trust etc. Bank vs. Gueder etc. Mfg. Co, 150 Ill, 336.

"Checks delivered to a bank for collection and deposit at a time when the bank was insolvent, as must have been known to its officers, and which had not been collected at the time the bank closed its doors remain the property of the depositor and may be recovered from the receiver."

Richardson vs. Dingue, 93 F. R., 572.
Richardson vs. Oliver, 105 F. R., 277.

"When a bank receives a deposit after hopeless insolvency, the fraud avoids the implied contract between the parties by which the relation of debtor and creditor would ordinarily arise and prevents the

money deposited from becoming the property of the bank and a trust is the equitable result."

Richardson vs. N. O. Deb. Redemption Co., F. R., 102, page 780.

City of Philadelphia vs. Eckels, 98 F. R., 485.

Same vs. Aldrich, 98 F. R., 487. 49 O. S., 401.

"And it is not necessary to trace the identical money into the receiver's hands but it is sufficient that the amount which went into his hands was increased by the amount of the deposit."

Same case. 785.

THE FRAUDULENT NATURE OF THE TRANSACTION

By which Reinhard & Company got the $2000 would have enabled the defendant in error to recover that money from the receiver or trustee in case it had not done what it did.

In re Weil, 111 F. R., 897.

"A merchant ordered goods from Paris which were shipped to him on credit in reliance on the report of a mercantile agency on a statement made by the purchaser which was false and misleading. The goods were received shortly before the purchaser's bankruptcy and he refused to receive the same and attempted to return them. Held that the sellers were entitled to rescind the sale for fraud, and recover the goods or the proceeds from the trustee of the bankrupt and that such right under the circumstances shown was not lost by the fact that they had not consented to the return of the goods when offered."

120 F. R., 992. *In re* Hilderband.

Syllabus 1—

"Where a sale of goods was induced by fraudulent representation as to the buyer's solvency, the seller on learning of the fraud may disaffirm the contract

and retake such of his property fraudulently obtained as he may be able to find in the buyer's possession and also maintain an action against the buyer for the value of the goods found.

Syllabus 2—

Where a claimant for goods obtained by a bankrupt under fraudulent representation as to his solvency filed a claim with the trustee for the goods sold and delivered under the contract, but not for the value of goods obtained by fraud, or for damages sustained by the fraud, he thereby elected to affirm the contract, and could not split his demand, and at the same time file a claim for a return of part of the goods sold, remaining in the bankrupt's possession at the time of the filing of his petition."

There is no distinction between the $1067.76 and the $980.45 herein sued for although the trustee makes a distinction. The identical $2000 which Reinhard & Company received went over their counter to their customers but according to the U. S. Circuit Court of Appeals of the 5th circuit in the Richardson case above quoted the "identical" money is not to be considered so that in this case it makes no difference whether the Commercial National Bank actually seized the identical $2000 or some other $2000 which it found in the possession of Reinhard & Company or some one else or any one else. It no doubt had a right to protect itself and if it could do so in any other way it was not necessary for it to wait for the slow and expensive process of the courts. If you have my horse and John Smith to whom you have loaned it sees fit to turn it over to me my possession is perfectly lawful and I am not required to bring a suit in replevin in order to recover it.

So in this case, the relation of debtor and creditor never having existed and the defendant in error having merely taken its own, there can be no question of diminishing the estate or of getting a larger per cent. than the other creditors of the same class.

Counsel for the plaintiff in error labor to give their interpretation of what they apparently claim to be the spirit of the law in order to overcome the obstacles in their way. It is an effort which may be made in all directions and when we come to consider frankly what the bankrupt law evidently aimed to accomplish, that is to say, the prevention of actual fraudulent preferences, it must be admitted that this is not one of the cases aimed at. The bankrupt law like other laws, by reason of its general terms and application, works hardships enough and some of these seem to be inevitable, but it is not necessary to strain any point to bring within its inhibition, by enforcing technical expressions and technical meanings, a case which was never intended to be embraced therein. The bankrupt law of 1898 was in more than one respect crude and already there are evidences by later legislation of a general purpose to correct many of these infirmities through which, by reason of that crudeness, it was apparent that injustice had resulted. I have no doubt we will have more in the same direction. It is worth notice that radical modifications have been already made with reference to this very matter of fraudulent preferences and some of these have been simply in the line of declaratory legislation following the decisions of our courts.

It is essential that the relation of debtor and creditor should exist at the time of the transaction and in the transaction itself.

Counsel for the plaintiff in error claims that because Reinhard & Company kept an account with the Commercial National Bank and a balance to their credit appeared on the tenth day of April, 1900, that that is an admission that the relation of creditor and debtor existed. Manifestly that is not the law as laid down by the Circuit Court of Appeals in the Richardson case. As I understand it the test is applied to the particular transaction. I may have been a depositor with Reinhard & Company during the whole period of their existence as a bank and have deposited and checked out money every day during that time, but if they received my last deposit "After hopeless insolvency, the fraud avoids the implied contract between the parties by which the relation of debtor and creditor would ordinarily arise." The whole argument of counsel for plaintiff in error in this case is based upon that condition of hopeless insolvency which they seek to bring home to us by rumor, hearsay and inference, and there is no question made about the fact of their having received our money after the condition claimed existed without giving us any warning. It is not therefore possible that the Commercial National Bank was a creditor in the ordinary acceptation of the term or the spirit in which the bankrupt law seeks to prevent fraudulent preferences or, if by any strained construction of phrases or words it would be possible to define the defendant in error in that transaction as a creditor, there certainly is no other creditor in the same class. Our money never became the porperty of Reinhard & Company although the actual cash which they received from us was taken to their banking house and paid out over their counter to their customers, but it was as

though a special deposit had been made of $2000.00 in bills wrapped up and locked up in a private box in their safe which they had taken out and paid over their counter to their customers. In law, and with special reference to the manifest intendment of the bankrupt law, there is no difference between the two performances, and why any difference is made between the $1067.76 which we seized in our own hands and the amount sued for here, which we seized from the manager of the clearing house (both transactions occurring on our premises and both being of the same nature in law), passes our understanding.

THE COMMERCIAL NATIONAL BANK HAD NO "CLAIM"

Against Reinhard & Company in the ordinary sense, upon which they received 100 per cent. They had our property which they had no right to have, and we took it just as soon as we could get hold of it. It was no more a part of the estate of Reinhard & Company than the capitol. It was ours all the time and never was theirs. If transactions of that kind could be sustained by the courts through such proceedings as the trustee has herein instituted, insolvent estates could be made solvent at the expense of the banks every day in the week.

We are willing to meet counsel for the plainitiff in error squarely upon the proposition that the test of voidable preferences is whether or not a transfer or payment will have the effect to pay on one claim a larger dividend out of the estate of the bankrupt than they would be able to pay on other claims, and we challenge counsel to produce a single case in which a transaction like the one we are considering is held to transform a victim of a fraud into

an ordinary creditor. All the cases that I have been able to find that in any way approach this proposition are emphatic the other way. The very test which the bankrupt law is so particular to apply against the bankrupt and those who are in collusion with him is the same test which the bankrupt law applies for the protection of those against whom frauds are practiced. In other words, it is not within the purpose and meaning of the bankrupt law to swell the estate of the bankrupt by seizing, directly or indirectly, property which never belonged to him. Moneys acquired in this way are not honestly acquired. They do not belong to the bankrupt and never did belong to him, and the same test which should always be applied as between the defrauded and the person who defrauds should be applied when the creditors of the person who committed the fraud are substituted for him through the processes of law. There is no possible way by which the creditors of Reinhard & Company can be made to stand in any better position than Reinhard & Company themselves. The intervention of a trustee in the bankruptcy proceedings has not changed the relative rights of the parties. The letter of the law will never be enforced as against its spirit.

There is a line of decisions of the Federal Courts in which current transactions of debit and credit occurring during the four months preceding the adjudication in bankruptcy are distinctly upheld as being lawful and not falling within the inhibition of the bankrupt law. These cases contain the principle for which I am contending in this case. I shall not here take space to refer to all of them, but in

order that they may be examined and their bearing ascertained, I refer to—

Dickson vs. Wyman, 11 F. R., 726.
In re Topliff, 114 F. R., 323.
Jaquith vs. Alden, 118 F. R., 270.

The syllabus in the latter case is as follows:

"A creditor whose debt was all created within the four months prior to the debtor's bankruptcy and while he was insolvent, but not to the creditor's knowledge, and was for goods sold to the debtor from time to time, is not chargeable with having received a preference which he is required to surrender before proving his claim, because of payments received on account during the same time, although the greater part of the debt was for goods sold prior to the last payment."

It will be instructive also to examine a few cases in which the courts have held that no preference resulted:

In re Dundas, 111 F. R., 500.

"An insolvent within four months prior to his bankruptcy borrowed $100 from one to whom he previously owed $75 and gave him an order on a third person for the entire amount which order was accepted and after the debtor's bankruptcy was paid: Held that, upon a finding that the creditor had at the time no reason to believe the debtor to be insolvent he was entitled to the money so paid, the $100 being the proceeds of a security taken for a previous consideration and $75 a preference, which, because he had received the money the creditor could not be compelled to surrender."

Dressel vs. North State Lumber Co., 119 F. R., 531.

(3.) "A payment received by a creditor of a bankrupt from a third party and which did not come out

of the assets of the bankrupt, does not constitute a preference.

(4). "A bank advances money drawn on a check by a corporation which afterwards became bankrupt, with the express understanding that the money was to be used only for a particular purpose. It was not so used and was later returned to the bank in payment of the check. Held, that such transaction did not constitute a preferential payment, so as to affect other creditors of the bank against the estate in bankruptcy."

III.

We agree with counsel for the plaintiff in error that the Federal Courts have repeatedly declared that the controlling principles of the bankrupt act are:

"(1) The protection and discharge of the bankrupt;

"(2) The distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him share and share alike among his creditors."

That is to say, it is the intention of the bankrupt law to reach back for a period of four months and, breaking down all barriers of fraud, no matter in what form they present themselves or how apparently lawful their aspect may be, seize all porperty of the bankrupt that he actually owned during that time and administer it for the benefit of his lawful creditors. But does that mean that the bankrupt law intends that it will reach out in the other direction and seize property that never did belong to the bankrupt because there is an apparent or technical claim that can be made? In other words, going in one direction it disregards all fraudulent transactions, but when it turns in the other direction it upholds them for the sake

of swelling the estate of the bankrupt. Will the court whose duty it is to interpret the provisions of the bankrupt law say that a palpable fraud committed by the bankrupt shall be sustained because it brings money into the hands of the court for distribution? A careful study of all the cases which have been cited will convince this court that such is not the intention of the law. That, whereas, on the one hand, it is right and proper that fraudulent preferences within the meaning of the law should be held for naught, yet that it is not every transaction having the outward appearance of a preference which is fraudulent any more than it is every transaction, which is in its form legal, that the court will sustain and, looking to the facts in this case, there can be only one answer to the inquiry as to the nature of the transaction of April 10, 1900.

Section 60*a* of the bankrupt law defines a preference in this way:

> "A person shall be deemed to have given a preference if being insolvent he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable one of his creditors to obtain a greater percentage of his debt than any other such creditors of the same class."

Section 60*b* tells us when such preferences are voidable:

> "*b.* If a bankrupt shall have given a preference and the persons receiving it are to be benefited thereby * * * shall have had reasonable cause to believe that it was intended thereby to give a preference it shall be voidable."

The "reasonable cause" must be to "believe" not to suspect that a "preference" was "intended thereby."

Counsel discuss this matter as though what the law had in mind was a reasonable cause to *suspect* that the debtor was insolvent, but the insolvency of the debtor is only a condition precedent and one of the items of proof which lead us to a conclusion that the debtor intended a preference and that the creditor must have known that he intended a preference. When we come to a close analysis of the words of the statute it is hardly possible to reach the conclusion that it is merely intended to fasten upon the creditor knowledge of the intent of the debtor growing out of the existence of certain facts calculated to put him upon his inquiry. It is a very easy matter to conceive of a case in which there would be no question about the proper application of the law. From this point of broadest condition of facts down to the point where it would be necessary to conclude that the creditor was not put on his guard and was not bound to believe, the descent is so gradual that we may have a thousand cases before we arrive at that point of doubt where very many cases might possibly be decided either one way or the other and then, having passed out of this middle ground, we arrive upon the other side of the line where there is no question and where stand all of those persons who are neither creditors in contemplation of law nor so associated with the transaction that they are bound to believe that a preference was intended. Some of the cases which are reported and which we have to consider and apply lead us into the doubtful ground where it is very difficult to tell upon which side of the proposition they may be used, and this doubt and confusion is sure to be greatest if we look merely to the surface of the facts and to the letter of the

law and lose sight of the underlying principles and of the evil that was intended to be remedied.

Under the bankruptcy act of 1898, Section 60*b*, providing that a preference given by an insolvent debtor within four months before the filing of a petition in bankruptcy shall be voidable by the trustee if the creditor had "reasonable cause to believe that it was intended thereby to give a preference" such cause of belief on the creditor's part implies, as its foundation, reasonable cause to believe that the debtor is insolvent within the meaning of that term as defined in the present act; and mere knowledge that the debtor "was behind in his payments with his creditors" is not sufficient to charge the creditor with such knowledge though he made no inquiry as to the debtor's solvency, if he did not practice any fraud, deceit, or collusion with the debtor.

In re Eggert, 98 F. R., 843.

I take it for granted that these and all former sections of the bankrupt law were intended to be used in the interest of absolute fairness and justice to all parties concerned and we have a right at this point to ask the question and to insist upon an answer to it. What is justice and what is fairness under the facts in this case? Considered in that line the lapse of two or three hours between the time when Reinhard & Company flimflammed us out of our $2000.00 to the time when we got it back again cuts no possible figure, in contemplation of the law as we have just stated it. It was all one transaction and, in view of the manifest principles of the law, in that transaction we never became a "creditor" of Reinhard & Company. I cannot see how it can possibly be otherwise.

The bankrupt law no doubt had in mind creditors in the ordinary acceptation of the term. Persons to whom the bankrupt owed money in the ordinary line of the bankrupt's business for which it was organized, including of course loans made to it in good faith by the banks in the ordinary line of its business and under the ordinary conditions; completed transactions. Never a fraudulent attempt to obtain a loan which by the act of the person intended to be defrauded was never completed. This is not a case of technical right. It is a case of moral right, just as in the reverse of the facts it is shown that a creditor has, under the guise of an apparently honest and proper transaction, obtained an unfair and dishonest preference which the courts will cut through by disregarding the form and manner of it in order to administer justice.

Therefore the plaintiff having planted himself upon technical lines we have a right to insist that if he has made a mistake in the form of his action he cannot recover in that action.

> "Though the words 'persons' and 'creditors' are used interchangeably in this sub-section it is clear that only a creditor can receive a preference. A payment or transfer to anyone other than a creditor, unless for the latter's benefit, falls within the remedy contained in Sections 67*e* and 70*e*. This was also so under the former law though voidable preferences and fraudulent transfers were regulated by the same section. Then as now the elements of these analogous transactions were somewhat different. The practitioner therefore should at the outset of a suit to recover decide whether the proposed defendant is a creditor or not. Pleading, proof, and possibly judgment will depend upon such decision."
>
> Collier on Bankruptcy, Edition 1903, page 422, discussing Section 60.

IV.

AS TO INSOLVENCY.

Counsel for the plaintiff in error make much of the claim of insolvency on the part of Reinhard & Company at the time of these transactions. There is nothing in this case to show that Reinhard & Company were really insolvent in the sense that they did not have enough property to eventually pay their debts, and this showing of insolvency is necessary to the plaintiff in error in order to work out his theory of the case, to wit, that because Reinhard & Company were in fact "insolvent" and because the money which we got "diminished the estate in the hands of the trustee," and because, further, we "received a larger percentage of our *claim* than any other creditor," ergo, there was a fraudulent preference! That being the case, we have a right to insist that it shall appear in this case that Reinhard & Company were in fact "insolvent." We are being held down by technical rules and far-fetched inferences in order that the plaintiff may make out a case, and we now insist that he has failed absolutely to show that Reinhard & Company were "insolvent." The fact that an assignment was made under the State law; the fact that rumors came to our ears; the fact that we had hearsay evidence that Reinhard & Company had closed their doors are only facts upon which the plaintiff has a right to base the claim that we were put upon our guard and were bound to inquire and to know. This is the plaintiff's theory. We were bound to know what, that appears in

this case? So far as the agreed statement shows nothing beyond these facts themselves. There is no agreement in this record that Reinhard & Company were "insolvent" in any sense, and there is certainly nothing to show that the estate will not eventually pay out in full.

In the City Deposit Bank case now pending in this court as case No. 138, the plaintiff was careful to go on the witness stand and show by his own testimony the condition of the Reinhard estate, but nothing of the kind was done in this case, and there is nowhere in the agreed statement any recital or admission that Reinhard & Company were insolvent in the sense that they did not have property enough to pay out. So that so far as the testimony in this case shows we were not put upon our inquiry as to any eventual state of insolvency, and that being the fact we were chargeable with nothing on account of any rumors or hearsay.

Mr. Collier in his last (1903) edition of his work on bankruptcy, on page 4, subdivision 15, thus defines insolvency: "In all foreign bankrupt laws, cessation of payments is the essential of insolvency. Until the passage of the present law, it was the test in the United States. Thus, it was held that 'the amount of the trader's property was of no consequence if he was unable to pay his debts in lawful money as they matured.' Under the law of 1898 the value of that property is the essential element. Insolvency turns on what is a 'fair valuation.' This has been held to be the present market valuation. Where the act of bankruptcy itself depreciates the debtor's property until, under this definition, he is insolvent, the petition against the alleged bankrupt must be dismissed. This new meaning of insolvency has been much criticised. It

is undoubtedly humane, but it is thought to put creditors at the debtor's mercy. On the other hand, it protects the debtor whose porperty is not quickly convertible. In this aspect it results in conditions not unlike those of a debtor who has taken advantage of the suspended payments periods sanctioned by some of the Continental bankrupt systems. In actual practice it has done no real harm. The Ray Amendatory Bill of 1902 sought to insert words which would have excluded exempt property from the aggregate of a debtor's assets in determining whether he was insolvent, but the Senate unfortunately struck out the provision. Exempt property should, therefore, be included as well as that not exempt."

It will be contended no doubt by plaintiff in error that the recital in the agreed statement of facts that, "At 12:15 o'clock p. m. of said day Reinhard & Company, a partnership composed of John G. Reinhard and Henry A. Reinhard, said partnership and each of said partners being insolvent, filed a deed of assignment in the Probate Court, etc.," is a conclusive admission as to the state of insolvency, but it is apparent that the words there used, "being insolvent," were only used to define their then condition of being unable to meet their debts as they fell due which brought about the act of making an assignment in the Probate Court, and was not intended to define their condition with reference to the provisions of the bankrupt law or the decisions of the courts interpreting that law. The statement is therefore not conclusive with reference to the proposition which we are now discussing. It was never the intention of the defendant in error, and that is also apparent from the wording of the agreement, to admit any one of the essential facts which would conclude it in its

position of resistance to the claim of the trustee. It has always maintained that there was no fraudulent preference, no preference of any kind in fact, and it therefore never has admitted any one of the points essential to the case of the plaintiff in error. Reinhard & Company were in fact at that time insolvent in the ordinary acceptation of the term. They could not meet their debts as they fell due, therefore the assignment was made, so that whatever argument is to be based upon the fact of insolvency must relate to the insolvency defined in Section 1, clause 15, of the bankrupt act, to wit: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may convey, transfer, conceal or remove, or permit to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

An instructive case upon the propositions involved herein will be found in the 42d Vol. of the Southeastern Reporter at page 432. It is the case of Sirrine vs. Stoner-Marshall Company, decided by the Supreme Court of South Carolina, August 16, 1902, the syllabus of which is as follows:

> "Under the bankruptcy act of 1898 providing that a transfer from an insolvent shall be an illegal preference where the creditor had reasonable cause to believe that it was intended thereby to give a preference, it is not enough that the creditor had some cause to suspect the insolvency of the debtor, but he must have had such a knowledge of the facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt."

The Court in deciding the case, after repeating the four essentials as laid down by Loveland in Section 194, says:

> "Under the act of 1867 insolvency existed when the debtor was unable to pay his debts as they became due in the ordinary course of his daily transactions, while under the act of 1898 insolvency exists when the debtor's whole property at a fair valuation is insufficient in amount to pay his debts. The rule established by the decisions of the United States Supreme Court as to the meaning of the words 'reasonable cause to believe, etc.,' under the act of 1897 is applicable in determining the meaning of the words 'reasonable cause to believe it was intended as a preference,' under the act of 1898, since a reasonable cause to believe a 'preference' was intended by the debtor involves a reasonable cause to believe the debtor to be insolvent, as a 'preference' depends upon insolvency."

Then, after referring to numerous cases, the court concludes (page 433) that it is not shown that the "defendant at the time of said payments had reasonable cause to believe that said payments were intended as a preference, for it was not shown that the defendant or its agents had reasonable cause to believe that the assets of W. E. Nesbitt and Company were insufficient to pay their indebtedness."

It is apparent that the Commercial National Bank did not believe Reinhard & Company to be "insolvent" in the sense of the Bankruptcy Act at the time referred to. It had cause to believe that there was a temporary embarrassment. The rumors it had heard and the hearsay evidence it had from Mr. Field undoubtedly raised the suspicion that there was such an embarrassment (actual fact it had none), but was it bound from this to "believe" actual "insolvency" as defined, existed? Was it compelled to

infer, or much less "believe," anything further? If so, by any strain of the principles of deduction, then we may say it did not believe such. The testimony shows it could not have had any further thought than of that sort of temporary embarrassment which banks more than any other business concerns are liable to, as we all know. Only a few hours before Reinhard & Company had $1067.76 to its credit with the Commercial National Bank, almost simultaneously the Commercial National Bank had let Reinhard & Company have $2000 on its draft on New York, almost simultaneously Reinhard & Company had done its usual business at the clearing house, and there was no suspicion of anything wrong until the rumors came and then, when the manager of the clearing house came to return the checks, the Commercial National Bank heard from Mr. Field for the first time that Reinhard & Company had "suspended."

The facts go to show that all the usual circumstances which in law are held to put creditors upon their inquiry are wanting. On the contrary, the facts show absolute faith in the solvency of Reinhard & Company down to the last second and then absolutely nothing to raise any presumption of such insolvency as we are dealing with, but at the most an inability to pay present demands, which may occur to a bank at any time and produce temporary "insolvency." In times of financial stress banks frequently have to close their doors because the cash to meet a "run" is not in the vaults (although the assets may be ten times the liabilities), and that is the most that can be charged against the Commercial National Bank in this case under the statement of insolvency on the part of Reinhard & Company, the Commercial National Bank

can only be charged with knowledge of the facts which inquiry would have disclosed, that is to say that the bank had suspended payment in the usual way.

"In an action by a trustee in bankruptcy to recover a preferential payment, the insolvency of the bankrupt at the time of payment and whether the payee had reasonable cause to believe that a preference was intended, are questions of fact determined by the verdict of the jury."

Kaufman vs. Treadway, 195 U. S., 271.

Respectfully submitted,

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Counsel for Defendant in Error.